

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY CAMPBELL,

Plaintiff,

No. CIV S-05-0711 GEB DAD P

vs.

S. SMILEY,

Defendant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 28 U.S.C. § 1983. On August 18, 2005, the court denied plaintiff's application requesting leave to proceed in forma pauperis, finding that on at least three occasions prior to the filing of this action lawsuits filed by the plaintiff were dismissed on the grounds that they were frivolous or malicious or failed to state a claim upon which relief may be granted. Based upon that finding plaintiff was ordered to submit the \$250.00 filing fee before proceeding with this action. The court has learned that the order of August 18 was issued in error in that the third dismissal upon which the court relied did not occur until after this action was filed. Accordingly, the order issued August 18, 2005, will be vacated.

Plaintiff's in forma pauperis application makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

1 Plaintiff is required to pay the statutory filing fee of \$250.00 for this action. 28
2 U.S.C. §§ 1914(a), 1915(b)(1). Plaintiff has been without funds for six months and is currently
3 without funds. Accordingly, the court will not assess an initial partial filing fee. 28 U.S.C.
4 § 1915(b)(1). Plaintiff is obligated to make monthly payments of twenty percent of the preceding
5 month's income credited to plaintiff's prison trust account. These payments shall be collected
6 and forwarded by the appropriate agency to the Clerk of the Court each time the amount in
7 plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

8 The court is required to screen complaints brought by prisoners seeking relief
9 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
10 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
11 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
12 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
13 U.S.C. § 1915A(b)(1),(2).

14 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
15 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
16 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
17 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
18 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
19 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
20 Cir. 1989); Franklin, 745 F.2d at 1227.

21 A claim should be dismissed for failure to state a claim upon which relief may be
22 granted if it appears beyond doubt that plaintiff can prove no set of facts in support of the claim
23 that would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing
24 Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt Lake Log Owners Ass'n, 651
25 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must
26 accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hosp.

1 Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the
2 plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v. McKeithen, 395 U.S. 411, 421
3 (1969).

4 The Civil Rights Act under which this action was filed provides as follows:

5 Every person who, under color of [state law] . . . subjects, or causes
6 to be subjected, any citizen of the United States . . . to the
7 deprivation of any rights, privileges, or immunities secured by the
Constitution . . . shall be liable to the party injured in an action at
law, suit in equity, or other proper proceeding for redress.

8 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
9 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
10 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
11 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the
12 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
13 omits to perform an act which he is legally required to do that causes the deprivation of which
14 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

15 In this case plaintiff alleges as follows:

16 On 4-7-05 I recived [sic] a[n] investigative report[.] [T]he report is
17 sapose [sic] to be issued 24 hours befor[e] the hearing and it
18 wasent [sic] and this violated my due process because the report
19 wasn't [sic] issued within the time constraint and S. Smiley new
20 [sic] of the process and when the report was sapose [sic] to be
21 issued and I was deprivd [sic] of this[.] [T]his is witten [sic] the
California Code of Regulations 3315 - 3318 this report was issued
erliy [sic] plaintiff seeks money damages due to the deprivstion
[sic] of plaintiff defendant subjected plaintiff two [sic] under the
fourthteeth [sic] amendant [sic] [.]

22 (Compl. at 3 & Attach.) Based upon the alleged violations plaintiff seeks compensatory damages
23 of ninety-nine million dollars from correctional officer Smiley who is employed at California
24 State Prison, Sacramento.

25 Plaintiff appears to be complaining that his prison disciplinary hearing was not
26 held within 24 hours after he received a rules violation report on April 7, 2005. The court notes

1 that plaintiff's complaint is dated April 7, 2005. Although plaintiff alleges exhaustion of
 2 administrative remedies, the allegation is implausible since plaintiff commenced this action on
 3 the very same day he received the rule violation report at issue. Likewise, plaintiff's allegation
 4 that he did not receive a hearing within 24 hours of receiving the rules violation report appears
 5 questionable in light of the fact that plaintiff filed the complaint in this action on the day he
 6 allegedly received the a rules violation report.

7 Even if plaintiff inadvertently alleged an incorrect date for his receipt of the rules
 8 violation report at issue, plaintiff's claim is without merit because plaintiff is mistaken regarding
 9 the requirements of the state regulation that sets time constraints for the conducting of prison
 10 disciplinary hearings. Section 3320 provides as follows:

11 The charges shall be heard within 30 days from the date the inmate
 12 is provided a copy of the CDC Form 115 unless the charges were
 13 referred for possible prosecution and the inmate has been granted a
 14 request for postponement of the disciplinary proceedings pending
 the outcome of the referral, or if the inmate is transferred out of the
 custody of the department.

15 Cal. Code Regs. tit. 15, § 3320(b) (emphasis added). Thus, the disciplinary hearing must be held
 16 within 30 days, not within 24 hours, after the inmate receives a copy of the Form 115. The
 17 regulation further provides that the inmate must have at least 24 hours to prepare for the hearing,
 18 unless the inmate waives the 24-hour period, in which case the hearing may be held before the
 19 24-hour period expires. Id., § 3320(c)(2). Plaintiff has not alleged that he waived the 24-hour
 20 period and requested an earlier hearing, but had he done so, prison officials were merely
 21 permitted, but not required, to hold his disciplinary hearing within 24 hours after providing him
 22 with a copy of the rules violation report.¹

23 Even if plaintiff were able to allege facts establishing a violation of a state
 24 regulation, he has not alleged facts stating a cognizable federal constitutional claim. It is well

25 ¹ The hearing "may be postponed up to 30 days upon the inmate's written request
 26 showing a reasonable need for postponement." Cal. Code Regs. tit. 15, § 3320(d).

1 established that inmates retain certain due process rights in prison disciplinary proceedings.
2 Wolff v. McDonnell, 418 U.S. 539, 563-71 (1974). However, state laws and regulations that
3 contain merely procedural requirements, even if those requirements are mandatory under state
4 law, do not give rise to a constitutionally cognizable liberty interest. Toussaint v. McCarthy, 801
5 F.2d 1080, 1098 (9th Cir. 1987). A state regulation gives rise to a liberty interest protected by
6 the Due Process Clause of the federal constitution only where the regulation pertains to freedom
7 from restraint that “imposes atypical and significant hardship on the inmate in relation to the
8 ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995). Plaintiff’s
9 allegations do not establish that he was deprived of any process due in the context of prison
10 disciplinary proceedings nor do they demonstrate that application of the state regulation imposed
11 an atypical or significant hardship on him in relation to the ordinary incidents of prison life.

12 It is evident from plaintiff’s misunderstanding of the applicable regulation that he
13 cannot cure the defects of his complaint. The undersigned will therefore recommend that this
14 action be dismissed on the grounds that it is legally frivolous and fails to state a claim upon
15 which relief may be granted pursuant to 42 U.S.C. § 1983.

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. The court’s order, filed on August 18, 2005, is vacated;
- 18 2. Plaintiff’s application to proceed in forma pauperis is granted;
- 19 3. Plaintiff is obligated to pay the statutory filing fee of \$250.00 for this action.

20 The fee shall be collected and paid in accordance with this court’s order to the Director of the
21 California Department of Corrections filed concurrently herewith.

22 Also, IT IS HEREBY RECOMMENDED that this action be dismissed on the
23 grounds that plaintiff’s claims are legally frivolous and fail to state a claim upon which relief can
24 be granted.

25 These findings and recommendations are submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty

1 days after being served with these findings and recommendations, plaintiff may file written
2 objections with the court. The document should be captioned "Objections to Magistrate Judge's
3 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
4 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
5 F.2d 1153 (9th Cir. 1991).

6 DATED: September 1, 2005.

7 
8 DALE A. DROZD
9 UNITED STATES MAGISTRATE JUDGE

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